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Supreme Court of the United States
OCTOBER TERM, 2000

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

MICHAEL M. MOORE,
Respondent.

On Petition for Writ of Certiorari
To The United Stated Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
-CAPITAL CASE-

The questions presented in this CAPITAL CASE by the petition are:

1. DOES A DEATH-SENTENCED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT/INNOCENCE PHASE OF TRIAL CONSTITUTE "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY WHEN THE RECORD SHOWS THAT TRIAL COUNSEL OPENLY AND REPEATEDLY CONCEDED TO THE JURY PETITIONER'S GUILT OF THE UNDERLYING FELONIES AND EVEN URGED THE JURY TO FIND PETITIONER GUILTY OF THOSE UNDERLYING FELONIES, THUS GUARANTEEING PETITIONER'S CONVICTION OF FIRST-DEGREE FELONY MURDER (AND EXPOSING PETITIONER TO THE DEATH PENALTY) WHEN, IN FACT, UNDER ESTABLISHED STATE LAW, PETITIONER'S ACTIONS COULD NOT HAVE GIVEN RISE TO A CONVICTION FOR THOSE UNDERLYING FELONIES?

2. DOES A DEATH-SENTENCED PETITIONER'S CLAIM OF PER SE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

CONSTITUTE "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY, WHEN UNDISPUTED FACTS SHOW THAT APPOINTED APPELLATE COUNSEL WAS AN OFT-HOSPITALIZED, MENTALLY ILL COCAINE ADDICT (SUBSEQUENTLY CONVICTED AND DISBARRED) AT THE TIME OF THE APPEAL?

3. HAS A DEATH-SENTENCED PETITIONER CONVICTED AS A NON-TRIGGERMAN ACCOMPLICE IN AN UNPREMEDITATED FELONY MURDER MADE "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY WHEN THE RECORD ESTABLISHES THAT HIS JURY WAS NEVER PROPERLY INSTRUCTED AS REQUIRED BY ENMUND V. FLORIDA, 458 U.S. 782 (1982) AND TISON V. ARIZONA, 481 U.S. 137 (1987) WHEN NO REVIEWING COURT HAS MADE THE REQUISITE EDMUND/TISON FACTUAL FINDINGS, AND WHEN, IN FACT, PETITIONER'S DEATH SENTENCE CANNOT STAND UNDER THE EIGHTH AMENDMENT ANALYSIS MANDATED BY EDMUND/TISON?

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LIST REQUIRED BY RULE 14.1(b) AND 29.6

Pursuant to this Court's Rule 14.1(b), the party who sought to have his judgment and conviction reviewed by the United States Court of Appeals for the Eleventh Circuit is William Van Poyck. Pursuant to this Court's Rule 29.6, Petitioner certifies that he is an individual.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

MICHAEL M. MOORE,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death, respectfully moves this Honorable Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit, entered on August 30, 2000, denying Van Poyck a certificate of appealability ("COA") as to three constitutional claims presented in his underlying

Petition for Writ of Habeas Corpus, with rehearing by a three-judge panel denied on November 9, 2000.

OPINIONS BELOW

The unreported single-judge order of the United States Court of Appeals, Eleventh Circuit, dated August 30, 2000, granting in part and denying in part Petitioner's Motion to Expand his Certificate of Appealability, appears in Petitioner's Appendix at A-2 through A-4. The November 9, 2000 order denying Petitioner's Motion for Reconsideration by a three-judge panel appears in Petitioner's Appendix at B-1 through B-2. The United States District Court's order, granting in part and denying in part Petitioner's Application for Certificate of Appealability appears in Petitioner's Appendix at C-1 through C-3. The United States District Court's order denying Van Poyck's Petition for Writ of Habeas Corpus appears in Petitioner's Appendix at D-1 through D-28. The state trial court's sentencing order - which is included in the Appendix as essential to an understanding of the issues - appears in Petitioner's Appendix at E-1 through E-5.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The decision of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was rendered by a single judge on August 30, 2000.

2. Petitioner's timely Motion for Reconsideration by a three-judge panel was denied on November 9, 2000.

3. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1), which permits this Court to review decisions of the Courts of Appeals denying applications for

certificates of appealability. Hohn v. United States, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition raises issues under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), specifically Title 28 U.S.C. § 2253(c), governing the issuance of certificates of appealability:

> SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 U.S.C. § 2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Basis for Federal Court Jurisdiction

Petitioner invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 2254(a). The appellate court had jurisdiction under 2254(a) and 2253(c) to determine the appropriateness of a certificate of appealability.

B. Underlying Facts and Proceedings Below

The evidence presented at Van Poyck's trial has been summarized by the Florida Supreme Court. See Van Poyck v. State, 564 So.2d 1066 (Fla. 1990). Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a prisoner at Glades Correctional Institution, to a West Palm Beach dermatologist's office. After they pulled into a parking space behind the office, they were confronted by Van Poyck and his co-defendant, Frank Valdes, both of whom were armed. Van Poyck took Turner's gun and forced him underneath the van. Meanwhile, Valdes forced

Officer Griffis to the rear of the van. While under the van, Officer Turner "saw Griffis exit the van; and while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground." Id. at 1067.

Van Poyck and Valdes were tried separately. The primary factual dispute at trial was the identity of the triggerman, with Van Poyck arguing that the evidence showed that Valdes shot Fred Griffis, and the State arguing that the circumstantial evidence showed that Van Poyck fired the fatal shots.[1] Van Poyck was convicted of first-degree murder, along with numerous other felonies, and sentenced to death. At his subsequent trial, Valdes was also convicted of first-degree murder and sentenced to death.

On Van Poyck's direct appeal, the Florida Supreme Court specifically held that the evidence was legally insufficient to establish that Van Poyck was the triggerman, and was legally insufficient to establish premeditation. Id. at 1069-70. The court nonetheless went on to uphold Van Poyck's conviction for first-degree felony murder, and upheld his death sentence. Id. at 1071. This Court subsequently denied *certiorari* review. Van Poyck v. Florida, 499 U.S. 932 (1991).

In December, 1992, Van Poyck filed a post-conviction Rule 3.850 motion in the state trial court wherein he presented a number of issues, including ineffective assistance of trial counsel during the guilt/innocence phase and the penalty phase. After an evidentiary hearing was conducted on some of these claims, the

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[1]At Valdes' subsequent trial the same prosecutor argued that Valdes was the triggerman; Valdes was subsequently convicted and also sentenced to death. Van Poyck took the stand (at Van Poyck's trial) and vehemently denied shooting the victim or even having seen it occur; Valdes did not testify.

trial court denied all relief. On appeal a divided Supreme Court, in a 4-3 decision, affirmed the denial of relief. Van Poyck v. State, 694 So. 2d 686 (Fla. 1997). This Court denied *certiorari* review. Van Poyck v. Florida, 522 U.S. 995 (1997).

In February, 1997, Van Poyck filed a state habeas corpus petition in the Florida Supreme Court raising three issues, one of which was ineffective assistance of appellate counsel based upon a complete mishandling of one of Van Poyck's direct appeal issues.[2] While this habeas corpus petition was still pending, Van Poyck's pro bono attorneys uncovered newly discovered evidence establishing that Van Poyck's direct appeal attorney, William Lasley, had been mentally ill and addicted to drugs (including crack cocaine) and was convicted of drug offenses and disbarred. Based upon this and additional information, Van Poyck filed a motion to amend his habeas corpus petition to include a claim of per se ineffective assistance of appellate counsel, which motion was granted.[3] On May 14, 1998, the Florida Supreme Court, in another 4-3 split decision, denied the *habeas corpus* petition. The split decision was over the ineffective assistance of appellate counsel claim. The court never mentioned counsel's drug addiction, mental illness, hospitalizations or disbarment, and made no mention at all of the expanded per se ineffectiveness

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[2] Appellate counsel did not write the direct appeal brief; Van Poyck himself did, and sent it to appellate counsel as a preliminary draft. Included in the draft was a meritorious voir dire argument, although because Van Poyck did not have the record he left the names of the jurors at issue blank. Appellate counsel simply had the brief typed up and filed, after filling in the blanks with the wrong two jurors. On direct appeal, the Florida Supreme Court agreed that the wrongly named jurors were impermissibly pro-death but denied the appeal because they had been excused for other reasons.

[3] This motion to amend habeas corpus petition also contained a motion for an evidentiary hearing.

claim, despite having previously indicated it would rule on that claim. See Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998). This Court denied *certiorari* review. Van Poyck v. Singletary, 119 S. Ct. 1252 (1999).

Van Poyck immediately filed a second habeas corpus petition before the Florida Supreme Court, along with a motion for an evidentiary hearing, raising the single claim of per se ineffective assistance of appellate counsel based upon counsel's drug addiction, mental illness, and hospitalizations.[4] On December 1, 1998, the Florida Supreme Court denied this habeas corpus petition without any opinion or explanation. Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998).

On February 3, 1999, Van Poyck filed a petition for writ of habeas corpus in the United States District Court, Southern District of Florida, raising 15 issues. Van Poyck also filed a motion for an evidentiary hearing and motion for leave to conduct discovery. On September 20, 1999, the District Court denied relief on all issues, and denied the motion for evidentiary hearing and motion to conduct discovery. See D1-D28, Petitioner's Appendix. Van Poyck filed a notice of appeal and an application for certificate of appealability for 16 issues (the additional issue being the denial of the evidentiary hearing). On November 15, 1999, the District Court certified two issues and denied certification on all others. See C1-C2, Petitioner's Appendix.

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[4]Appellate counsel William Lasley had in fact been hospitalized for mental illness during the time of Van Poyck's original *certiorari* proceeding before this Court, causing this Court (Justice Kennedy) to grant Van Poyck an extension of time, on November 29, 1990, to file that *certiorari* petition.

On February 11, 2000, Van Poyck filed in the United States Court of Appeals for the Eleventh Circuit, his "Motion for Certificate of Appealability," seeking a COA on 11 issues (Van Poyck thus dropped three of the issues originally presented in his habeas corpus petition). On August 30, 2000, a single judge (Honorable J. L. Edmondson) granted Van Poyck a COA on four additional issues, but denied a COA for the other seven. See A2-A4, Petitioner's Appendix.

Van Poyck next filed his timely "Motion for Reconsideration by Three-Judge Panel of Single Judge's Denial in Part of Certificate of Appealability," wherein he sought a COA for three of the seven issues for which a certificate had been denied. On November 9, 2000, the Court of Appeals rendered a one-page order denying Van Poyck's motion for reconsideration of the August 30, 2000 order. See B1, Petitioner's Appendix.

C. Facts Pertaining to Questions Presented

Petitioner is seeking certification of three separate constitutional claims. Preliminarily, the standard for a *habeas* petition to obtain a COA from the Appellate Court is set forth in the AEDPA, codified at Title 28 U.S.C. § 2253(c)(2), which requires that the Petitioner's claim make "a substantial showing of the denial of a constitutional right." The standard for issuance of a COA is low – Van Poyck need only show that reasonable minds could differ, i.e., that issues presented are debatable, could be resolved differently, or deserve further proceedings. See, e.g., Carson v. Dir. of Iowa Dept. of Correctional Srvcs., 150 F.3d 973, 975 (8th Cir. 1998). Moreover, when a district court has not considered the merits of constitutional issues – which, as will be seen, occurred here – such issues must be certified for appeal. Morris v. Horn, 187 F.3d 333, 341 (3d Cir. 1999).

1. **Facts Pertaining To Question I** At trial, the State prosecuted Van Poyck under the dual theories of felony murder and/or premeditated murder.[5] Two underlying felonies were offered to support a conviction for first-degree felony murder: (1) robbery (the taking of Officer Turner's pistol) and (2) "attempted escape." Proof showing the commission of these felonies beyond a reasonable doubt was of course necessary to sustain a felony murder conviction.[6] Thus, under State law, for Van Poyck to be guilty of first-degree felony murder in this case, he must have been perpetrating, or attempting to perpetrate, either a robbery or an escape, or both. Notably, although Van Poyck was charged with robbery, he was not charged with escape or attempted escape (because Van Poyck was not in custody, and custody is an essential element of escape or attempted escape). Rather, Van Poyck was charged with "aiding an attempted escape."

At trial, Van Poyck's attorney repeatedly and consistently conceded to the jury Van Poyck's guilt of robbery and attempted escape; these concessions are a matter of record and were made without Van Poyck's approval or acquiescence. ROA 2899, 2902-04. Trial counsel not only conceded the felony of attempted

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[5] Under Florida's "general" first-degree murder statute, Fla. Stats. § 782.04(1)(a), the State can simply charge a defendant with first-degree murder and is not required to allege or prove whether the homicide was premeditated or felony murder. Likewise, the jury may return a "general verdict" of guilty of first-degree murder without specifying whether it is premeditated or felony murder.

[6] Under Fla. Stat. § 782.04(1)(a)2, in order for a defendant to be guilty of first-degree felony murder, the homicide must have been "committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . (d) Robbery . . . [or] . . . (g) Escape . . . ."

escape, but also inexplicably conceded that Officer Griffis was killed in the course of this felony:

> He's guilty of aiding an escape. Not a whole lot of time back there [in the jury room] when you read the instructions and hear it from the judge deciding that he is guilty of that crime because he is.
>
> . . .
>
> Then the other question is, is it felony murder? Did the death occur as a consequence of and while the crime of escape or robbery was being committed? And then the question and the answer to that, at least to this part, is yes, except that it was an independent act on the part of Valdez.[7]

ROA 2899, 2903.[8]

On direct appeal, the Florida Supreme Court specifically acquitted Van Poyck of premeditated murder, but affirmed the first-degree murder conviction on a felony murder basis. Van Poyck v. State, 564 So.2d 1066, 1069 (Fla. 1990). The Court went on to uphold the death sentence. Thus, the only way Van

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[7] As the above would suggest, the only defense offered at the guilt phase of Van Poyck's trial was the so-called "independent act" defense, which counsel would later (at the post-conviction stage) admit was a "dead dog loser" in that it had no application to the facts of this case. T. 1145

[8] Citations to the record on direct appeal are referred to as "ROA ___." Citations to the record in the post-conviction evidentiary hearing are referred to as "T. ___."

Poyck stands exposed to the death sentence is under the felony murder theory that trial counsel repeatedly conceded at trial. Absent the felony murder conviction, Van Poyck would not be on death row.

2. **Facts Pertaining To Question II** In 1997, while Van Poyck's state habeas corpus petition was pending before the Florida Supreme Court, Van Poyck's pro bono attorneys discovered certain facts regarding Van Poyck's direct appeal attorney, William Lasley. These facts shed new light on the reason why Lasley had so thoroughly bungled one of Van Poyck's strongest direct appeal claims:[9]

- Lasley was a long-term drug addict (by his own admission he was addicted to crack cocaine and a slew of other drugs), and had been repeatedly hospitalized for such.

- Lasley was mentally ill (by his own admission and according to numerous doctors treating him), and had been repeatedly hospitalized for such.

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[9] On direct appeal, Van Poyck had clear reversible trial errors when he had been improperly forced to waste virtually all of his peremptory challenges striking clearly biased jurors, and when ultimately two biased jurors actually sat on his jury. On appeal, Lasley inexplicably named the wrong two jurors (naming jurors who had been excused by the Court, rather than the two who sat on the jury). It is undisputed that Lasley botched this issue (a fact confirmed by the Florida Supreme Court in Van Poyck v. Singletary, 715 So. 2d 930, 935-41 (Fla. 1998)). What was not known at that time was why or how Lasley could have made such an error. The underlying IAC claim is currently pending in the Eleventh Circuit. What the Eleventh Circuit refused to certify was the issue of per se ineffectiveness arising out of these facts.

- The appellate brief filed in Van Poyck's direct *appeal* (and upon which the Supreme Court determined Van Poyck's fate) was not written by Lasley. Rather, Lasley took a handwritten draft brief, written by Van Poyck himself and sent to Lasley for incorporation into the final brief, and simply typed and filed it, passing it off as his own.

- In the draft brief, Van Poyck left blanks for the jurors' names on the peremptory challenge issue because he had no record to work with; Van Poyck asked Lasley to insert the correct names but Lasley mishandled even this minor task.

- Lasley filed no reply brief in Van Poyck's appeal.

- The 1990 *certiorari* petition filed in this Court by Lasley, on Van Poyck's behalf, was, again, written by Van Poyck (Lasley simply typed it and filed it as his own).

- Lasley was repeatedly hospitalized during this period (1990 onward) for mental illness and drug addiction, causing this Court (Justice Kennedy) to grant Lasley an extension of time to file Van Poyck's *certiorari* petition (because Lasley had again been hospitalized).

- Lasley was subsequently arrested for possession of crack cocaine.

- Lasley pled "not guilty by reason of insanity" to the above charge.

- Lasley was convicted of the above charge.

- Following an extensive (and documented) Bar investigation, the Florida Supreme Court suspended Lasley from the practice of law for the drug conviction and for theft of clients' funds.

Based upon the foregoing, Van Poyck, in 1997, immediately moved the Florida Supreme Court for leave to file an amended habeas corpus petition to add a claim of per se ineffective assistance of appellate counsel. Simultaneously, Van Poyck moved for a full plenary evidentiary hearing, and supported his filings with a wealth of documents (many of which were court filings and records) which established all of the foregoing factual allegations. The Supreme Court allowed the amendment, stated it would consider the claim on the merits and did not rule on the motion for the evidentiary hearing. When the Florida Supreme Court handed down its split 4-3 decision, Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998), it made no mention at all of this new claim. Van Poyck immediately filed a second habeas petition in the Florida Supreme Court, raising this sole claim (per se ineffective assistance of appellate counsel), and again moved for an evidentiary hearing. The Court summarily denied this petition on December 1, 1998, without opinion or explanation. Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998).

When Van Poyck filed his federal habeas corpus petition, the claim of per se ineffective assistance of appellate counsel was a featured claim (Issue V, pages 78-85 of petition). Van Poyck specifically moved for a full evidentiary hearing on this claim and

moved for leave to conduct discovery on this claim. The district court denied Van Poyck's habeas petition, refusing to allow any discovery or evidentiary hearing. The court's denial of this particular claim consisted of just four sentences and one cited case. Two of these sentences were clearly erroneous factual misstatements, and the one cited case, Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), was later reversed by this very Court, Williams v. Taylor, 529 U.S. 362 (2000). Only after Van Poyck filed his appeal in the Eleventh Circuit did he learn that the State had omitted from the record (which it was ordered to file with the District Court) any and all documents relating to Van Poyck's state court habeas corpus petitions. Thus, when the District Court denied this claim, it did so without ever having even seen or reviewed any of Van Poyck's state court filings relating to this claim, including the wealth of supporting documentation showing the facts underlying it.

3. **Facts Pertaining To Question III** As previously indicated, the Florida Supreme Court upheld Van Poyck's death sentence only under felony murder. In other words, the Florida Supreme Court ruled that Van Poyck could not have been constitutionally convicted or sentenced to death on the basis that he was the person who actually pulled the trigger, but rather his sentence was permissible only because he was a participant in a crime in connection with which the killing took place. Consequently, his sentence was proper only if in conformity with this Court's rulings in Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), which, together, set forth the standards governing when a non-triggerman defendant can be sentenced to death. The trial court cobbled together an instruction with only traces of Enmund and Tison, and the instruction was misleading and confusing. It read:

> In order to recommend a sentence of death, the jury must find that the defendant killed or attempted to kill or intended or **contemplated** that a killing would take place, or that **illegal** force be employed. However, if the jury finds that the defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the defendant did not actually kill or intend that a killing take place.

ROA 3582.

The impropriety of this instruction was argued on direct appeal, as well as in Van Poyck's post-conviction proceedings, and also was presented in his federal habeas corpus petition below.

REASONS FOR GRANTING THE WRIT

This capital case presents this Court with an opportunity to clarify the AEDPA standard for granting, or refusing to grant, a certificate of appealability. Petitioner submits that the perceived standard for granting a COA has gradually and inexorably risen to such an extent that it now meets the level necessary to prevail on the merits of an appellate claim itself. The COA procedure was designed to present a not unreasonably high threshold over which an appellant must step in order to fully brief and argue the merits of his or her claims. Yet the COA process has increasingly come to supplant the appellate process itself and substantial constitutional claims are being summarily disposed of at the COA level.

The three appellate issues presented herein provide a textbook example of how, even in a capital case, very substantial constitutional violations can be totally insulated from federal appellate review by a misapplication of the COA standard. Petitioner submits that this Court should be justifiably shocked that the lower courts have effectively held that the three appellate issues presented herein fail to "make a substantial showing of a denial of a constitutional right," without any kind of reasoned analysis, indeed in the case of the per se ineffectiveness claim (and because the State failed to comply with the District Court's order to file the complete record) without even having the key portions of the record before it.

Granting certiorari in this case will promote uniformity in the lower courts by providing needed guidance as to what types of constitutional claims do, or do not, rise to the statutory threshold level of "making a substantial showing of a denial of a constitutional right" as mandated by Title 28 U.S.C. § 2253(c)(2). Although the term "substantial showing" is not a novel concept, current practice demonstrates that the lower courts, and all litigants, will benefit from a more certain interpretation by this Court.

Moreover, as to Petitioner's Argument II herein, this case presents this Court with an opportunity of first impression to more fully clarify the elements of a claim of per se ineffective assistance of counsel, alluded to, but not expounded upon in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). Various lower courts have wrestled with the concept of per se ineffectiveness of counsel claims, under a variety of factual scenarios, but would be greatly served by guidance from this Court.

ARGUMENT I

A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT/INNOCENCE PHASE CONSTITUTES, AT A MINIMUM, "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT CERTIFICATION WHEN THE UNDISPUTED RECORD SHOWS THAT TRIAL COUNSEL OPENLY AND REPEATEDLY CONCEDED TO THE JURY THE PETITIONER'S GUILT OF THE UNDERLYING FELONIES AND EVEN URGED THE JURY TO FIND PETITIONER GUILTY OF THOSE UNDERLYING FELONIES, THUS GUARANTEEING PETITIONER'S CONVICTION OF FIRST-DEGREE FELONY MURDER (AND EXPOSING PETITIONER TO THE DEATH PENALTY) WHEN, IN FACT, UNDER ESTABLISHED STATE LAW, PETITIONER'S ACTIONS DID NOT CONSTITUTE THOSE UNDERLYING FELONIES.

It was inexcusable for trial counsel to concede that Van Poyck was guilty of the underlying felonies of robbery and attempted escape, and to actually concede that Van Poyck was guilty of felony murder. Under the Sixth Amendment, a defense attorney may not admit or concede his client's guilt without first obtaining his client's consent. Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert denied, 470 U.S. 1059 (1985). A defendant's knowing and intelligent consent may not be presumed, but, rather, must be clearly apparent from the record. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). This is true even when the evidence against the defendant is overwhelming and the attorney admits guilt in a strategic attempt to retain his

credibility with the jury. Francis at 1194. The reason for this protection is that counsel must hold the prosecution to its heavy burden of proof in criminal cases. United States v. Cronic, 466 U.S. 648, 656 n.19 (1984). Accord, Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1980) (petitioner was deprived of effective assistance of counsel when defense attorney admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy.)

Moreover, numerous courts have held that such concessions of guilt constitute per se ineffectiveness of counsel under Cronic when such concessions of guilt result in a "complete breakdown in the adversarial process which resulted in a complete denial of [the] right to counsel." Wiley, supra. In United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), the Court held that defense counsel improperly conceded, during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute. The appellate court held that counsel's abandonment of his client's defense caused a breakdown in the adversarial system of justice, was inherently prejudicial, and, under Cronic, no separate showing of prejudice was necessary. Id. at 1074-76. See also People v. Hattery, 109 Ill.2d 449, 488 N.E.2d 513 (1985) (defense counsel is per se ineffective when counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently conceded to the strategy), cert. denied, 478 U.S. 1013, 106 S.Ct. 3314 (1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (it is per se ineffective assistance of counsel when trial counsel admits defendant's guilt without the defendant's consent), cert. denied, 476 U.S. 1123, 106 S.Ct. 1992 (1986).

In the instant case, the prejudice is self-evident. Counsel's concession ensured that Van Poyck would be convicted of first-degree felony murder, and thus exposed him to the death penalty.

Because the Florida Supreme Court acquitted Van Poyck of premeditated murder, it is only the felony murder conviction (conceded by counsel) which now has Van Poyck on death row. This is especially egregious because, under State law, Van Poyck's actions in all likelihood legally could not have constituted the underlying felonies of robbery and/or attempted escape.

First, with respect to robbery, Van Poyck's actions in disarming Officer Stephen Turner during the aborted attempt to free O'Brien did not constitute "robbery." See, e.g., Mahn v. State, 714 So.2d 391, 396 (Fla. 1998) ("evidence fail[ed] to establish an intent to commit a robbery or theft at the time of the homicide . . . no evidence that the crimes were motivated by the desire to take property"). The taking of the firearm was incidental to, and not causally connected to, Officer Griffis' death. In short, "robbery" of the firearm was not the motive behind the homicide. See Bailey v. State, 199 So.2d 726, 727 (Fla. 1st DCA 1967) (intent to deprive must have existed at time of the taking); Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990) (discussing the requirements in felony murder cases of a causal link between the robbery and the homicide). Accord, Jones v. State, 580 So.2d 143, 146 (Fla. 1991) (error to find as aggravating factor that murder was committed during robbery where defendant's taking of victim's firearm was only incidental to the killing and not the reason for it).

With respect to escape, or attempted escape, the concession of guilt was equally, if not more, unreasonable and prejudicial.[10]

Under Florida law, to be guilty of escape or attempted escape, an essential element which must be proven is that the defendant was "in lawful custody." Kyser v. State, 533 So.2d 285, 287 (Fla. 1985) (vacating felony murder conviction when one underlying felony was escape and defendant was not under arrest). It was never alleged that Van Poyck was in "lawful custody" and he was never charged with escape or attempted escape. Rather, Van Poyck was charged with aiding an attempted escape. Yet, to be guilty of first-degree felony murder with escape or attempted escape as the underlying felony, Van Poyck must have been "engaged in the perpetration of or in the attempt to perpetrate an . . . escape." In short, aiding an attempted escape simply is not one of the enumerated underlying felonies for first-degree felony murder set forth in Fla. Stat. § 782.04(1)(a)2g, and Van Poyck, as a matter of law, could not be guilty of first-degree felony murder with escape as the underlying factor.

Instead of vigorously contesting these underlying felonies, Van Poyck's counsel conceded them, thus guaranteeing a conviction for first-degree felony murder and exposing Van Poyck to the death penalty. Under established case law, such a concession constitutes ineffective assistance of counsel. Van Poyck has easily met his burden of "making a substantial showing

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[10] It appears that what counsel did was concede guilt to the charged crime of "aiding an escape," but then never took issue with whether this was one of the underlying felonies eligible to sustain first-degree felony murder. Instead counsel conceded that the death occurred "as a consequence of and while the crime of escape or robbery was being committed." ROA 2899, 2903.

of a denial of a constitutional right," and is entitled to certification of this claim. The lower court erred in holding that this claim does not meet the standard for certification set forth in 28 U.S.C. §2253(c)(2).

ARGUMENT II

A CLAIM OF PER SE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CONSTITUTES, AT A MINIMUM, "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT CERTIFICATION WHEN THE UNDISPUTED FACTS AND RECORDS SHOW THAT COUNSEL WAS AN OFT-HOSPITALIZED, MENTALLY ILL COCAINE ADDICT (SUBSEQUENTLY CONVICTED AND DISBARRED) WHO MERELY FILED HIS CONDEMNED CLIENT'S HANDWRITTEN DRAFT BRIEF.

Van Poyck submits that his appellate representation by a drug-addicted, mentally-ill attorney in the midst of a mental breakdown, who botched Van Poyck's direct appeal, was the functional equivalent of having no counsel at all, and that such representation amounts to per se ineffective assistance of counsel.[11] This Court has held that there are rare cases in which counsel's representation is so egregious that it constitutes per se

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[11] In the absence of any evidentiary hearing, Van Poyck's well-pled factual allegations in his petition are required to be taken as true. Buenoano v. Singletary, 963 F.2d 1433, 1439 (11th Cir. 1992). In reality, virtually all of these allegations are well-documented indisputable matters of public record.

ineffectiveness, eliminating the need to show specific prejudice. In such cases, prejudice is presumed. See Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). In Strickland, this Court held that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n.25, 104 S. Ct., at 2046-2047, and n.25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.

Strickland, at 692 (emphasis added). Likewise, in Cronic, this Court stated a fundamental Sixth Amendment principle:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, at 656-57 (emphasis added). Later, the Cronic court went on to hold:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is

> unjustified . . . [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Id. at 658-59 (emphasis added). In the instant case, the appellate confrontation was between the State, on one hand, with all its resources, and a handwritten draft brief written by a condemned prisoner without any appellate record to work with. The prosecution's case was not subjected to meaningful adversarial testing in the appellate process. Other courts, under a variety of factual scenarios, have likewise concluded that counsel's representation can be so flawed as to warrant a finding of per se ineffectiveness. For example, in two separate "sleeping counsel" cases, in which defense counsel slept through a large portion of their clients' trial, courts have held counsel to be per se ineffective. In Javor v. United States, 724 F.2d 831 (9th Cir. 1994), the court held:

> Today we conclude that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary [citations omitted]. Javor's Sixth Amendment right to counsel was violated not because of specific legal errors or omissions indicating incompetence, but because he had no legal assistance during a substantial portion of his trial . . . .
>
> . . .

> Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all. The mere physical presence of an attorney does not fulfill Sixth Amendment entitlement to the assistance of counsel . . . [A]n attorney's absence prejudices a defendant more by what was not done than by what was done.

Id. at 833 (emphasis added). Van Poyck submits that having a drug-addicted, mentally-ill attorney was "the equivalent to no counsel at all." In Tippins v. Walker, 889 F. Supp. 91 (S.D.N.Y. 1995), the Court granted the writ of habeas corpus when counsel slept through much of the trial:

> Accordingly, as the Second Circuit has accepted Javor's holding that sleeping counsel is tantamount to no counsel at all, this Court holds that Tirelli's sleeping constituted a per se violation of petitioner's Sixth Amendment right to effective assistance of counsel. The Court rejects the law espoused by the [lower state courts] that petitioner must demonstrate that he was prejudiced by the fact of his counsel's slumber.

Id. at 94.

Likewise, under the unique facts of this case, Van Poyck should not have to demonstrate specific prejudice (though he has done so). Rather, prejudice must be presumed and Van Poyck is entitled to a new belated appeal. Other cases in which courts have held counsel to be per se ineffective are Hays v. State of Alabama, 85 F.3d 1492 (11th Cir. 1996) (prejudice presumed when counsel absent, prevented from assisting during critical state, or if counsel

failed to subject prosecution's case to meaningful adversarial testing); Golden v. Newsome, 755 F.2d 1478 (11th Cir. 1985) (absence of counsel is presumptively prejudicial); Green v. Arn, 809 F.2d 1257, 1263 (6th Cir. 1987) (temporary absence of counsel during critical stage is prejudicial per se and not subject to harmless error inquiry); Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984) (circumstances which would warrant a presumption of prejudice from counsel's ineffectiveness are those in which adversary process itself is rendered presumptively unreliable by the circumstances).

In Strickland, this Court concluded its analysis of ineffective assistance of counsel claims with this caveat:

> Although those [foregoing] principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. 696 (emphasis added). Here, there was just such a breakdown in the adversarial process, rendering the result of Van Poyck's 1990 direct appeal unreliable. It is difficult to imagine a more egregious case of incompetent counsel than the case here; yet, all Van Poyck is requesting is a simple opportunity

to fully brief this issue and have it heard on appeal.[12] Van Poyck respectfully submits that, before the State of Florida puts a person to death, its citizens should, and do, expect more from the adversarial process than was accorded here.

ARGUMENT III

A DEATH-SENTENCED, NON-TRIGGERMAN ACCOMPLICE CONVICTED FOR FELONY MURDER MAKES, AT A MINIMUM, "A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT" SO AS TO MERIT CERTIFICATION WHEN THE RECORD CLEARLY ESTABLISHES THAT HIS JURY WAS NEVER PROPERLY INSTRUCTED PURSUANT TO ENMUND V. FLORIDA/TISON V. ARIZONA, AND WHEN NO REVIEWING COURT HAS YET MADE THE REQUISITE ENMUND/TISON FACTUAL FINDINGS.

It is now beyond question that Van Poyck was not the triggerman. And, while it is not certain whether the finder of fact convicted on the basis of felony murder or premeditation, every court considering Van Poyck's sentence since has upheld that conviction only because of the felony murder rule. Thus, Van

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[12] The district court ruled on the issue without evidence due to the State's failure to comply with the district court's order to file all parts of the state court proceedings. Likewise, the Florida Supreme Court ignored the issue altogether, despite stating that it would address it. Consequently, if this Court denies this Petition, the per se ineffectiveness claim will have gone through the entire State and Federal system without a single court having addressed it in any meaningful manner.

Poyck was entitled to a jury instruction for non-triggerman defendants per Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987).

In Enmund, the Court found a death sentence to be unconstitutional under the Eighth and Fourteenth Amendments in the absence of proof that the defendant "killed or attempted to kill . . . regardless of whether [the defendant] intended or **contemplated** that life would be taken." Id. at 801. In Tison, another felony murder case dealing with a non-triggerman, the Supreme Court revisited Enmund and enunciated a two-part test which must be satisfied before the imposition of a death sentence in a felony murder case. Factual findings must be made that:

(1) the defendant was a major participant in the felony committed; and

(2) the defendant acted with reckless indifference to human life.

Judged against these Enmund/Tison requirements, the instruction Van Poyck received was woefully deficient. This is the instruction the trial court actually gave:

> In order to recommend a sentence of death, the jury must find that the defendant killed or attempted to kill or intended or **contemplated** that a killing would take place, or that **illegal** force be employed. However, if the jury finds that the defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the

> defendant did not actually kill or intend that a killing take place.

ROA 3582.

There are no fewer than four errors of constitutional dimension with respect to this instruction and thus the manner in which the findings were evaluated.

First, the Enmund instruction as proposed[13] by the trial court allowed a death sentence so long as lethal force was "contemplated." This simple misuse of "contemplation" results in a serious misstatement of the law. Tison had held that using the "contemplation of lethal force" language makes the definition of intent overly broad because it makes the standard of intent to kill little more than a restatement of the felony/murder rule itself. Second, the instruction as actually given was even worse–it allowed the jury to recommend death on a finding that the defendant contemplated that "illegal" force (as opposed to "lethal") force, was contemplated. Third, the Tison instruction misstated the law because it did not separate Van Poyck's mental state from the time up to and including the shooting of Officer Griffis (which occurred seconds after the incident began) from any mental state that Van Poyck may have had later. Finally, neither the trial court nor the Florida Supreme Court actually made the required factual findings that this Court stated in Tison

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[13] The instruction the trial court proposed differed from the above in that the court proposed the adjective "*lethal*" instead of merely "*illegal*" as was actually given. Given that this word modifies "force" and hence establishes the level of force which is required to have been present, the difference between these adjectives is tremendous: there are obviously countless degrees of "illegal force" which fall far short of "lethal force."

must be made before a death sentence can be upheld. See E1-E5, Petitioner's Appendix.

Ignoring clear precedent from this Court - which the trial court blatantly did in both its jury instruction and sentencing order - is serious. Yet every reviewing court to date has given this claim only the most cursory of analysis,[14] and with the lack of a COA this meritorious Constitutional claim (like the per se IAC claim) is destined for no scrutiny at the federal level. The Constitution requires more. Van Poyck made a "substantial showing of the denial of a constitutional right." A COA should have issued.

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[14] The district court below ignored three of the four arguments completely, focusing only on the "lethal" vs. "illegal" aspect of instruction. This complete failure of analysis alone is impermissible, and should have warranted a COA if for no other reason so that some court, somewhere would actually review the claim. Even on the one issue the district court did address (the "illegal" versus "lethal" error in the jury instruction) the district court erred. The district court presumed in its opinion that the court reporter must have been incorrect in preparing the transcript of the jury instruction. The law is the exact opposite–it presumes that the certified transcript is correct. See Fla. Stat. § 90.108; 28 U.S.C. §753. The Eleventh Circuit failed to address these errors.

CONCLUSION

WHEREFORE, based upon all of the foregoing, Petitioner submits that he has met the statutory standard and that he is entitled to certification of the three constitutional claims presented herein.

Respectfully submitted,

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APPENDIX

August 30, 2000, order of the United States Court of Appeal, Eleventh Circuit, granting in part and denying in part Petitioner's motion to expand the certificate of appealability — A2-A4

November 9, 2000, order by three-judge panel of the United States Court of Appeal, Eleventh Circuit, denying Petitioner's motion for reconsideration — B1

November 15, 1999, order by the United States District Court, Southern District of Florida, granting in part and denying in part Petitioner's application for a certificate of appealability — C1-C2

September 20, 1999, order by the United States District Court, Southern District of Florida, denying Petitioner's Petition for Writ of Habeas Corpus — D1-D28

December 21, 1988, sentencing order by the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County — E1

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT FILED

No. 99-14734-P

WILLIAM VAN POYCK,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
MICHAEL W. MOORE, Secretary
of Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Petitioner, William Van Poyck, filed a motion to expand the certificate of appealability granted by the district court for his appeal of his petition for federal habeas relief under 28 U.S.C. § 2254. That motion sought to have this court certify eleven additional issues. The motion is granted in part. In addition to the two issues certified by the district court (ineffectiveness assistance of appellate counsel and ineffective assistance of trial counsel at penalty phase), the certificate of appealability is expanded to include the following issues:[7]

1. Whether the trial judge and trial jury considered an invalid aggravating factor, whether defendant was the "triggerman," at the sentencing phase (Issue 9 of Petitioner's Habeas Petition to the District Court)?

2. Whether the State withheld material, exculpatory evidence of the State medical examiner's assessment (Issue 12 of Petitioner's Habeas Petition to the District Court)?

3. Whether Petitioner was denied due process when the trial court failed to grant a continuance between the guilt and penalty phases (Issue 11 of Petitioner's Habeas Petition to the District Court)?

4. Whether the trial court failed to conduct an independent evaluation of the mitigating evidence

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[7] Characterization of the issues is that provided by Petitioner in his motion for certificate of appealability to this court.

offered by Petitioner (Issue 13 of Petitioner's Habeas Petition to the District Court)?

For any and all other issues raised by Petitioner, a certificate of appealability is hereby DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14734-P

WILLIAM VAN POYCK,
Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
MICHAEL W. MOORE, Secretary of
Florida Department of Corrections,
Respondents-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: EDMONDSON, COX and MARCUS, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of this Court's August 30, 2000 single judge order is **DENIED**.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM VAN POYCK,

CASE NO. 99-8091-CIV-DIMITROULEAS

Plaintiff,

vs.

MICHAEL W. MOORE,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon the Notice of Appeal, Petitioner's Application For Certificate of Appealability, Petitioner's Memorandum of Authorities in Support of Application for Certificate of Appealability and Motion for Leave to Submit Memorandum in Excess of Twenty Pages, and the Court having carefully considered the record and being otherwise fully advised in the premises, finds as follows:

On September 20, 1999, this Court denied a Petition For Writ of Habeas Corpus [DE-373]. On October 14, 1999, this Court denied a Motion To Alter Or Amend Judgment Under Rule 59(e)[DE-40). On November 12 1999, Petitioner filed this motion requesting a certificate of appealability.

Since the Eleventh Circuit Court of Appeals requires this Court to rule pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, see Hunter v. United States, 101 F. 3d 1565 (11th Cir. 1996), this Court will rule on such certification, and this Court determines that the Petitioner has satisfied the required showing as to two issues in his February 3, 1999 Section 2254 Petition. Issues which are meritless should not be certified. Hunter v. Bowersox, 172 F. 3d 1016 (8th Cir. 1998). Only two issues are not meritless: Issue I, Ineffective Assistance of Counsel in the Penalty Phase and Issue III, Ineffective Assistance of Appellate Counsel. The Court certifies that Petitioner has made a substantial showing of the denial of a constitutional right as to Issues I and III, 28 U.S.C. 2253(c)(2); U.S. v. Weaver, ____ F. 3d ____ 1999 WL 1009218 (DC Cir. Nov. 9, 1999).

Accordingly, it is ORDERED AND ADJUDGED that an Application for Certificate of Appealability is hereby GRANTED IN PART and DENIED IN PART. The Motion for Leave To Submit Memorandum in Excess of Twenty Pages is GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this _____ day November, 1999.

WILLIAM P. DIMITROULEAS
United States District Judge

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM VAN POYCK,

CASE NO. 99-8091-CV-DIMITROULEAS

Petitioner,

vs.

MICHAEL W. MOORE,

Respondent.

_____/

ORDER

THIS CAUSE having been heard upon Petitioner's one hundred sixty-six (166) page February 3, 1999 Petition For Writ of Habeas Corpus [DE- 1], Petitioner's July 15, 1999 Motion to Allow Discovery [DE-15], Petitioner's August 3, 1999 Motion to Extend Time For Completion of Discovery and For Filing of Motions for Evidentiary Hearing and Summary Judgment [DE-31], Petitioner's August 16, 1999 Motion for Evidentiary Hearing and Memorandum [DE-35 and DE-36], and Petitioner's August 16, 1999 Motion For Summary Judgment [DE-34], and the Court having considered the Respondent's one hundred eight (108) page May 18, 1999 Response to Petition For Writ of Habeas Corpus [DE- 12] and Petitioner's August 16, 1999 Reply to Response to Petition For Habeas Corpus [DE-33] the Respondent's August 11, 1999 Response to Petitioner's Motion

For Discovery [DE-32] and the Court having reviewed the Completed Record on Appeal [DE-17-29], except [DE-20, page 2926 and DE-21, page 3322], makes factual findings and legal conclusions as indicated below and denies relief.

The Petition should be denied for the reasons set forth below. Consequently, Petitioner's Motion to Allow Discovery [DE-15], Motion to Extend Time For Completion of Discovery and For Filing of Motions for Evidentiary Hearing and Summary Judgment [DE-31], Motion For Evidentiary Hearing [DE-35] and Motion for Summary Judgment [DE-34] are DENIED AS MOOT.

I. BACKGROUND

The Petitioner (Van Poyck) was convicted in the Circuit Court of Palm Beach County of First-Degree Murder, Attempted First-Degree Murder, Aiding an Escape, Aggravated Assault, Armed Robbery and six counts of Attempted Manslaughter on November 15, 1988. Three days later, the jury recommended a death sentence (11 to 1 vote), which the Honorable Michael Miller, the trial court, imposed on December 21, 1988 (finding four aggravating circumstances). The four aggravating circumstances were: under a sentence of imprisonment, crime committed for purpose of escape, great risk to others, and previous conviction of violent felony.

A direct appeal was taken, and Van Poyck raised six (6) issues in the guilt phase; among these issues were : 1) Insufficient Evidence for Premeditated Murder, Attempted First-Degree Murder, Aiding an Escape, and Attempted

Manslaughter; 2) Denial of Severance of Offenses; and 3) Violation of Rule of Lenity. The Florida Supreme Court agreed that the evidence was insufficient for premeditated murder, but clearly sufficient for felony murder. Van Poyck raised fifteen (15) issues in the penalty phase: 1) Failing to consider mitigating evidence and rejecting undue influence factor; 2) Great risk factor unconstitutional on its face and as applied; 3) Great risk factor inapplicable; 4) Error in denying great risk limiting instruction; 5) Error in Enmund instruction; 6) Insufficient Enmund findings; 7) Improper rulings on challenges for cause; 8) Death penalty statute is unconstitutional; 9) Inadequate time before penalty phase for mental evaluation; 10) Improper Hobson choice to forgo sequestration between phases in return for more time; 11) Improper consideration of invalid prior convictions; 12) Felony murder aggravator inherent in crime; 13) Ineffective assistance of counsel, first by failing to investigate. A: Van Poyck's mental illness, B) co-defendant's background, and C) who shot the victim and, second by inadequate cross-examination of Turner, the surviving guard; 14) Proportionality; and 15) Unconstitutional statute. The Florida Supreme Court stated that the record established that Van Poyck was the instigator who played the major role in the crime and was the primary participant in the crime; he knew that lethal force could be used. The death sentence was proportional. The Florida Supreme Court unanimously affirmed the judgments and death sentence. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990).

On March 18, 1991, the United States Supreme Court denied certiorari. Van Poyck v. Florida, 499 U.S. 932 (1991).

In an unrelated matter, Van Poyck apparently filed a Petition for Writ of Habeas Corpus in state court complaining about prison conditions. Relief was summarily denied by the trial court, but on appeal, the trial court was ordered to award the prisoner an evidentiary hearing. Van Poyck v. Dugger, 579 So. 2d 346 (Fla. 1st DCA 1991).

On December 8, 1992, Van Poyck filed a motion for post conviction relief (Rule 3.850) in the trial court. A substantial evidentiary hearing was held in early 1994, and on July 8, 1994, the Honorable Walter Colbath denied all relief. In an appeal to the Florida Supreme Court, Van Poyck raised sixteen (16) issues. Van Poyck v. State, 694 So. 2d 686, 696-699 (Fla. 1997). The main issue raised was ineffective assistance of counsel. First, Van Poyck argued that at the penalty phase, trial counsel was ineffective by failing to investigate mitigating factors. The Florida Supreme Court found that trial counsel's strategy and the actual mitigation that was presented supported the trial court's denial of relief. The Florida Supreme Court further opined that Van Poyck could not have demonstrated that, but for counsel's errors, he would have probably received a life sentence. Second, Van Poyck claimed that trial counsel was ineffective at the guilt phase. The Florida Supreme Court, in affirming the lower court's denial of relief, quoted a Van Poyck evidentiary hearing witness who had to admit that the case was a loser at the guilt phase of the trial. [DE-29, pages 844, 895-896, 1004]. By a 4 to 3 margin the Florida Supreme Court affirmed the denial of relief. Van Poyck v. State, 694 So. 2d 686 (Fla. 1997). The three dissenters found no problem with the guilt phase of the trial. The United States

Supreme Court denied certiorari on December 1, 1997. Van Poyck v. Florida, 118 S.Ct. 559 (1997).

In February 1997, while the appeal of the Rule 3.850 motion was still pending, Van Poyck filed a Petition For Writ of Habeas Corpus in the Florida Supreme Court. On August 28, 1997, Van Poyck filed a motion requesting that he be allowed to amend the petition to include evidence of appellate counsel's mental and drug problems. In 1998, the Florida Supreme Court denied the Petition For Writ of Habeas Corpus by a 4 to 3 vote. Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998). The United States Supreme Court denied certiorari on March 22, 1999. Van Poyck v. Singletary, 119 S. Ct. 1252 (1999).

On August 28, 1997, a second state habeas petition was filed. It was denied on December 1, 1998. Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998).

In the 1990 direct appeal opinion, the Florida Supreme Court summarized the following factual findings:

> The record establishes that on June 24, 1987, two corrections officers, Steven Turner and Fred Griffis, transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van, while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming

a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time, Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and

pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of the gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr.22 caliber semiautomatic pistol, and Turner's Smith and Wesson.38 caliber service revolver.

Van Poyck, testifying on his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally he stated that they took three guns with them.

II. STANDARD OF REVIEW

Under Section 28 U.S.C. 2254 (d), a federal habeas court may not grant relief for any claim adjudicated on the merits by a state court unless the state decision was contrary to, or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or the state court's determination of facts was unreasonable in light of the evidence. See also Neelly v. Nagle, 138 F. 3d 917 (11th Cir. 1998), cert. denied, 119 S.Ct. 811(1999) [a three step process to determine if the state decision was debatable, and should thereby stand]. The state court decision must stand unless it is not debatable among reasonable jurists that the result was incorrect. Moore v. Johnson, 101 F. 3d 1069, 1076 (5th Cir. 1996).

Under 28 U.S.C. 2254 (e)(1), a state court's factual findings shall be presumed correct and the applicant for a writ of habeas corpus bears the burden of rebutting this presumption by clear and convincing evidence.

Under the amended 28 U.S.C. 2254 (e)(2):

> If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the Court shall not hold an evidentiary hearing on the aim unless the applicant shows that -
>
> (A) the claim relies on -

> (i) a new rule of constitutional law, made retroactive to case on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Furthermore, after receiving a state court hearing on the issue, a petitioner can only receive a federal evidentiary hearing on the same issue if he can show cause for his failure to develop facts in the state court proceedings and actual prejudice resulting from that failure, or if he can show that a fundamental miscarriage of justice would result from failure to hold such a hearing. A petitioner seeking to rebut the strong presumption of effectiveness of counsel bears a difficult burden. Waters v. Thomas, 46 F. 3d 1506, 1512 (11th Cir. 1995). Cases in which habeas petitioners can prevail on ineffective assistance claims are few and far between. Rogers v. Zant, 13 F. 3d 384, 386 (11th Cir. 1994). Cases in which deliberate strategic decisions have been found to constitute ineffective assistance of counsel are even fewer and farther between. Spaziano v. Singletary, 36 F. 3d 1028, 1039 (11thCir. 1994).

III. ISSUES

Van Poyck has raised fifteen (15) issues in this petition:

1. Van Poyck has not shown that trial counsel was ineffective at the penalty phase. Trial counsel was tactically able to present a great deal of mitigating evidence of Van Poyck's background without opening the door to negative information; including over twenty prison disciplinary reports [DE-29, page 1065]; for example: fights [DE-24, pages 1151, 1203, 1209, 1245], an escape attempt [DE-23, page 721], weapons offenses [DE-23, pages 928,930 and DE24, pages 1290, 1356, 1509], and arsons [DE-24, page 1342 and DE-25, page 2057]. Dobbs v. Turpin, 142 F. 3d 1383 (11th Cir. 1998); Lamb v. Johnson, 179 F. 3d 352 (5th Cir. 1999). Moreover, the prison records reflect that in March, 1977, Van Poyck had been placed in administrative confinement in prison for typing a letter to another inmate in which he stated that he knew that he would wind up on death row in a couple of years and that he would not hesitate to destroy any snake in a brown uniform. [DE-23, page 676 and DE-29, page 1241]. Van Poyck, 694 So. 2d 686, 695. Trial counsel was also able to introduce mitigating evidence without opening the door to further harmful testimony.

In spite of these efforts, the mitigating evidence was rejected by the trial court and jury. Oats v. Singletary, 141 F. 3d 1018 (11th Cir. 1998). The Florida Supreme Court also explicitly rejected the Defendant's complaints. Van Poyck, 694 So. 2d 686, 694. Van Poyck has not satisfied his burden to show that there is a reasonable probability that, but for trial counsel's perceived errors, there would have been a different result. Scrutiny of counsel's performance should be highly deferential. Mills v. Singletary, 161 F. 3d 1273, 1286 (11th Cir.

1998). Counsel ethically and tactically decided not to call Dr. Villalobos who would have had to admit that the Defendant had confessed faking mental illness while in prison, and was, in his opinion, a sociopath. [DE-29, pages 1070-1081, 1104]. Moreover, the first defense witness at the penalty phase was Deborah Chisolm, the jail nurse, who gave very favorable testimony for the petitioner. She admitted that she did not see any evidence of a mental disorder in the petitioner during the five months that she came into contact with him in the jail. She testified that he seemed very level headed and very mature. [DE-21, page 3232]. Petitioner's brother testified that Petitioner had no learning disabilities and was intelligent [DE-21, page 3320]. Given that lay testimony, calling an expert on mental health certainly would not have changed the outcome of the sentence, particularly when Van Poyck's mental health problems had ended in the mid 1970's. [DE-24, page 1548; DE-25, pages 2167-2168; DE-29, page 1242]. Nothing that trial counsel learned from talking to Van Poyck indicated he was suffering from any mental disorder. Williams v. Head, 1999 WL 652425 ____F. 3d. ___(11th Cir. Aug. 26, 1999). When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless, counsel's decision not to pursue those investigators may not later be challenged as unreasonable. Mueller v. Angelone, 181 F. 3d 557, 580 (4th Cir. 1999).

In this habeas petition, Van Poyck claims that the following mitigation factors should have been developed: A) Mom died when he was an infant; B) Neglect and abandonment; C) Abused by housekeeper; D) Early exposure to and dependency on alcohol; E) Sent to boys school at Okeechobee; F) Physically and sexually abused; G) Mental illness - organic impairment, personality disorder, and dependent upon James O'Brien. However, the record

demonstrates that counsel did call witnesses and family members to testify about most of these matters and about Van Poyck's childhood. Trial counsel need not interview all family members. Williams 1999 WL 652425. Jeff Van Poyck testified that their mother died when Petitioner was only five years old. Van Poyck, 694 So. 2d 686, 693. Jeff Van Poyck testified that the housekeeper abused the children, beat and spanked them [DE-21, pages 3261-3262; 3311]. Jeff Van Poyck testified about how he exposed Petitioner to alcohol and crime. Anne Van Poyck, the Petitioner's Aunt, testified about unstable Aunt Phyllis Marion. [DE-21, pages 3342-3346]. Petitioner testified about his strong feelings for James O'Brien. Deborah Chisholm, the jail nurse, also testified that Van Poyck was sorry and committed the crime out of friendship for O'Brien. [DE-21, page 3230]. She testified that Van Poyck was a "very caring person, very friendly, very loving and very intelligent, and somebody that I really enjoyed talking to." Van Poyck, 694 So. 2d 686, 692. Chisholm testified that Van Poyck made friends with everybody, had no enemies, and tried to break up fights. [DE-21, page 3 229]. Finally, she testified that Van Poyck was capable of giving and receiving love. [DE-21, page 3239]. Lee Hightower Van Poyck, the Petitioner's stepmother, testified about Van Poyck's father, unstable Aunt Phyllis, and the family situation. [DE-21, pages 3363-3377]. She testified that the Petitioner was sent to Okeechobee. [DE-21, page 3381]. The Petitioner also testified. He admitted that he was responsible for Mr. Griffis' death and that he believed that people should be responsible for their own actions. Van Poyck, 694 So. 2d 686, 693-94.

The Florida Supreme Court correctly observed that the jury was aware of most aspects of Van Poyck's life. Id at 692. Van Poyck did not tell trial counsel about abuse as a youth. [DE-29, pages 1101-1102]; Porter v. Singletary, 14 F. 3d 554,

560 (11th Cir. 1994). Petitioner has also not established prejudice. Boyd v. Ward, 179 F. 3d 904 (10thCir. 1999). There is no reasonable probability that trial counsel's performance could have been improved so as to have yielded a different result. Felder v. Johnson, 180 F. 3d 206 (5thCir. 1999). In addition, Van Poyck denied ever being raped. [DE-29, page 1105]. Further, a defendant who withholds information from trial counsel to set up a 3.850 motion should not later benefit. [DE-29, page 1240]. Van Poyck has not shown that, but for these perceived errors at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under state law. Sawyer v. Whitley, 505 U.S. 333, 350 (1992). Establishing that trial counsel, with more time and resources, could have done better does not warrant habeas relief. Williams 1999 WL 652425.

2. Van Poyck has not shown that trial counsel was ineffective at the guilt phase. Van Poyck has complained that counsel failed to show that he was not the trigger man, failed to impeach a key state witness, failed to present an intoxication defense, failed to request a change of venue, inadequately performed on voir dire, conceded guilt, failed to preserve a Batson[1] claim, allowed the prosecutor to shift the burden of proof, inappropriately requested co-counsel status for Van Poyck and failed to object.

First, Van Poyck complains that serological evidence and gun sales records would have been helpful in arguing that he was not the triggerman. At trial, counsel was able to establish that Van Poyck did not have the victim's blood on him, without introducing evidence that would have caused the court to award the final closing argument to the State.

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[1] Batson v. Kentucky, 476 U.S. 79 (1986)

Establishing that the victim's blood was found on his Co-Defendant, Valdez, and that the gun belonged to Valdez would not have excluded Valdez as the trigger man. As testified at trial, Valdez searched the victim's pockets after he was shot, looking for the keys to free O'Brien. [DE-20, pages 2595, 2650]. Trial counsel admitted in the Rule 3.850 hearing that DNA evidence was fairly uncommon at the time of the trial. [DE-29, page 843]. In fact, no Florida appellate decision had allowed DNA evidence until just weeks before the start of the trial. Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988). Judge Colbath appropriately found that DNA evidence would not have altered the outcome of the case. [DE-27, page 4974]. Lafevers v. Gibson 182 F. 3d 705, 722 (10thCir. 1999). Trial counsel tactically decided not to go forward with DNA testing. [DE-29, page 1093].

As to gun sales evidence, Van Poyck testified that the guns belonged to Valdez, and the prosecutor did not dispute that contention. Defense counsel called no witnesses and therefore preserved his right to opening and closing arguments. [DE-20, page 2835-2836 and DE-29, pages 1111-1113]. Rule 3.250, Fla. R. Crim. Proc., Lamar v. State, 583 So. 2d 771 (Fla. 4th DCA 1991). In his closing argument, counsel was able to argue that Van Poyck did not shoot Griffis. [DE-20, pages 2877-2890]. It is not unusual for a Florida attorney to attempt to utilize some strategy in an effort to maintain the right to have the last closing argument before the jury. See e.g. Jackson v. State, 700 So. 2d 14 (Fla. 2d DCA 1997). Therefore, the limited probative value of introducing serological or gun receipt evidence did not strategically outweigh the importance of having the last closing argument. Van Poyck, 694 So. 2d 686, 697. Moreover, Van Poyck cannot establish prejudice since the State clearly argued the case under both a premeditated and felony murder theory [DE-20, page 2913,

2927], and Van Poyck admitted at trial his involvement in the felony murder. [DE-20, pages 2566-2569, 2572 for escape, pages 2580, 26332634 for robbery].

Second, Van Poyck complains about the cross-examination of the surviving guard, Steve Turner. However, trial counsel did impeach Turner with inconsistent statements from his deposition [DE-19, pages 1799-1800] and argued to the jury that Turner had changed his story. [DE-20, pages 2896, 3004]. See Sims v. Singletary, 155 F. 3d 1297 (11th Cir. 1998). Defense counsel was able to imply that Turner was shot by Valdez [DE- 19, page 1757]. Defense counsel was able to establish that the guns were similar in appearance [DE-19, page 1760]. Later, in cross-examination of the firearm's expert, Gerald Styers, defense counsel established how difficult it would be for someone to determine the caliber of a gun by looking down the barrel of it [DE-20, pages 2237-2239]. Defense counsel repeated that point in his closing argument. [DE20, pages 2892-2894]. Defense counsel impeached Turner by omission from his statement to the police. [DE- 19, pages 1771-1772]. Defense counsel questioned Turner on his ability to see and hear the things about which he testified. [DE-19, pages 1790, 1796-1797]. Defense counsel tried to establish that Van Poyck concentrated on Turner while Valdez concentrated on Griffis. [DE-19, pages 1791-1795]. Trial counsel decided tactically not to flat out attack Turner because he would be a sympathetic witness to the jury. [DE-29, page 1090]. Finally, the Florida Supreme Court found counsel's performance was not deficient in this area of the trial. Van Poyck, 694 So. 2d 686, 697. Quite simply, trial counsel effectively cross-examined Turner.

Third, Van Poyck complains about the lack of a voluntary intoxication defense. While such a defense can be

viable in a felony murder case, such as this case, here the facts did not support that defense. Van Poyck not only told counsel that he was not intoxicated the day of the murder, [DE-29, pages 1086-1087] he also so testified [DE-20, pages 2629-2630; 2638-2839]. He told the jail nurse that he was not under the influence of alcohol or drugs. [DE-21, page 3235]. Counsel cannot be faulted for failing to pursue a non-existent voluntary intoxication defense.

Fourth, trial counsel did err in failing to renew his motion for a change of venue. Counsel was happy with the jury [DE-29, page 1089] and reasonably feared that a change in venue would result in a more death prone venire. [DE-29, pages 1084-1085]. Provenzano v. Singletary, 148 F. 3d 1327 (11th Cir. 1998). During jury selection, defense counsel stated that he could not believe that no one had heard about this case. [DE- 18, page 556]. A renewed motion for change of venue would likely have been denied, and the denial would not have been an abuse of discretion. Henyard v. State, 689 So. 2d 239 (Fla. 1996); Farina v. State, 679 So. 2d 1151 (Fla. 1996).

Fifth, Van Poyck complains about counsel's performance during voir dire. None of his complaints would have affected the outcome of the case, as indicated in issues three (3) and four (4) below.

Sixth, Van Poyck alleges that his counsel conceded guilt. Trial counsel did not concede guilt of first-degree murder in his closing argument. [DE-20, pages 2869-2870]. However, admissions in closing argument that are undeniable are not inappropriate. McClain v. Hill 52 F. Supp. 2d 1133 (C.D. Ca 1999). Such admissions can lend credibility to other arguments. U.S. v Short, 181 F. 3d 620, 624-625 (5th Cir. 1999); U.S. v. Wilks, 46 F. 3d 640 (7th Cir. 1995); [DE-20, pages

2867-2868]. Here, counsel's closing argument was an appropriate trial strategy given the Defendant's testimony and the independent act aspect of the felony murder instruction. U.S. v. Gomes, 177 F. 3d 76 (1st Cir. 1999), but see, Scarpa v. DuBois, 38 F. 3d 1 (1st Cir. 1994). Judge Colbath appropriately found that there was no prejudice in that the evidence of guilt was overwhelming. [DE-27, page 4974]. Again, everyone agreed that this case was a "loser" for the defense in the guilt phase. [DE-29, page 844].

Seventh, Van Poyck claims his counsel failed to preserve a Batson claim during jury selection. Counsel did preserve the challenge to juror Paula La Counte [DE- 18, page 1129]. La Counte indicated she was against the death penalty. [DE- 18, page 484]. Although the court did not excuse La Counte for cause, her opposition to the death penalty was a valid race-neutral reason for a peremptory challenge. See Williams v. State, 622 So. 2d 456 (Fla. 1993).

Eighth, the prosecutor did not shift the burden of proof to Van Poyck. Defense counsel argued appropriately [DE-20, pages 2870, 2872, 2898] as did the State. [DE-20, page 2914].

Ninth, trial counsel cannot be faulted for asking that Van Poyck be appointed co-counsel. Van Poyck regarded himself as a very fine jail-house lawyer. Judge Miller on several occasions complemented him on his pleadings and/or arguments. [DE- 17, pages 403, 414]. Defense counsel argued at Van Poyck's clemency hearing that he had excellent legal skills [DE-29, page 898-899]. Trial counsel argued that Van Poyck was very knowledgeable in the law. [DE-29, page 1057]. Certainly, there is no constitutional right in Florida to such hybrid representation. State v. Tait, 387 So. 2d 338 (Fla. 1980); Stinnett v. State, 576 So. 2d 927 (Fla. 3d DCA 1991); Smith v. State 444 So. 2d 542 (Fla. 1st DCA 1984). However,

the Florida trial court has the discretion to allow or disallow such a co-counsel status. Raulerson v. State, 437 So. 2d 1105 (Fla. 1983); Bell v. State, 699 So. 2d 674 (Fla. 1997). The trial court exercised its discretion to allow such a status, Myles v. State 582 So. 2d 71 (Fla. 3d DCA 1991), and trial counsel was not ineffective in seeking the co-counsel appointment.

Tenth, Van Poyck complains about counsel's failure to object. Defense counsel did object. [DE-20, pages 2924, 2947 and DE-21, pages 2959, 2998]. There has been no showing that any additional objections would have been sustained. Moreover, no prejudice has been shown. Sims v. Singletary 155 F. 3d 1297 (11th Cir. 1998); Boyd v. Ward, 179 F. 3d 904 (10th Cir. 1999). At the conclusion of the evidence in the guilt phase, the trial judge found that defense counsel had been very well prepared, and that they made an excellent presentation. Van Poyck agreed with the trial judge and stated that he was satisfied with their representation. [DE20, page 2682]. See Jones v. State, 643 So. 2d 1150 (Fla. 3d DCA 1994), but see Robinson v. State, 549 So. 2d 1181 (Fla. 1st DCA 1989). Moreover, the illness of trial counsel's father did not affect the outcome of this case. [DE-29, page 1243]. Trial counsel was an experienced criminal defense attorney. He had been asked by Judge Hurley[2] to take the case. [DE-29, page 1043]. The strong reluctance to second guess strategic decisions should be even greater where those decisions were made by experienced criminal defense counsel. Provenzano v. Singletary, 148 F. 3d 1327, 1332 (11th Cir. 1998). Trial co-counsel, Michael Dubiner, was board certified in criminal trials at the time of the trial, [3] [DE-29, page 905].

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[2] The Honorable Daniel T.K. Hurley who now serves on the Southern District of Florida.

[3] See The Florida Bar Journal, page 394 (September, 1988).

3. Van Poyck's complaint about ineffective assistance of appellate counsel does not warrant relief. Van Poyck complains that appellate counsel named the wrong jurors in his brief when he alleged an improper denial of a challenge for cause. Appellate counsel named jurors Bruscette and Abufaris in his brief as jurors who should have been excused for cause. Van Poyck now alleges that it was jurors Moody and Bradford who should have been excused for cause. As indicated in issue 4 below, both Moody and Bradford were appropriately on the jury. All jurors said they would follow the law; denials of challenges for cause were not inappropriate. Tactical choices regarding issues raised on appeal are properly left to the sound professional judgment of counsel. Workman v. Bell, 178 F. 3d 759, 771 (6th Cir. 1999); Wright v. U.S., 182 F. 3d 458, 466 (6th Cir. 1999). No prejudice has been shown by appellate counsel's allegedly naming the wrong jurors. Moreover, there is no federal question for this court to consider. This claim was not presented to the Florida Supreme Court.

4. Van Poyck's challenges for cause were properly denied. Van Poyck complains that jurors Mary Bradford, Goldie Moody, Wilma Busto, Linda Moker, Charles Carter, Ronald Nickerson, Derek Miller, George Farmer, and Frank Aldridge should have been excused for cause. The last seven jurors were excused by defense peremptory challenges. However, those nine jurors had later been rehabilitated, so that a challenge for cause was not improperly denied. See DE-18: Mary Bradford - pages 865-873, 976-977; Ronald Nickerson - pages 459, 1072-1073; Derek Miller - pages 629-632, 1153-1154; Linda Moker - pages 638-644, 1072-1073; George Farmer - pages 654-665; Frank Aldridge - pages 698-706, 976-977; Wilma Busto - pages 726-732, 976-977; and Charles Carter - pages 838-844, 976-977. See also Parker v. State, 641 So. 2d 369 (Fla. 1994).

The Court's indication that a challenge for cause against Juror Chase would have been appropriate was not an abuse of discretion where the juror was in a methadone program and kept leaving the courtroom. Pre-trial, trial counsel had asked for additional peremptory challenges. The trial court indicated that he would consider additional peremptory challenges if there were close calls on challenges for cause. [DE-17, pages 222-223]. At the conclusion of the jury selection, in a clear effort to create a point on appeal, the defense asked for an additional peremptory challenge [the Court had already allowed twelve (12) challenges when only ten (10) challenges were mandated by Florida law, Rule 3.350(a)(1), Fla. Rules Crim. Proc.; Parker v. State, 456 So. 2d 436 (Fla. 1984); Livingston v. State, 512 So. 2d 223 (Fla. 4th DCA 1987)], and the court challenged the defense counsel to show him an unfair juror. When defense counsel mentioned Juror Goldie Moody, the Court indicated that Moody had not been previously challenged for cause. Juror Moody had previously indicated that she would follow the law. [DE18, pages 509-513]. The Court again had a colloquy with Juror Moody who indicated she could follow the law. [DE-19, pages 1360-1362]. The Court then offered the defense an additional peremptory challenge as long as defense counsel agreed that Juror Chase, who was in a methadone clinic and who kept leaving the courtroom, be excused for cause. Juror Chase clearly qualified as a challenge for cause, and, moreover, it is unclear whether Juror Chase was even the next juror to be considered. Defense counsel refused the court's offer and withdrew his request for additional peremptory challenges. [DE-19, page 1365]. The Defendant then personally expressed satisfaction with his lawyers. [DE-19, page 1367]. None of the jurors who served on the trial were biased against the Petitioner [DE-29, page 1089]. U.S. v. Brooks, 175 F. 3d 605 (8th Cir. 1999).

5. Appellate counsel's alleged mental illness and drug abuse is irrelevant. The comparison to sleeping trial counsel is inappropriate. Both the trial court and Florida Supreme Court found the representation to be effective, and those findings are entitled to a presumption of correctness. Williams v. Taylor, 163 F. 3d 860 (4th Cir. 1998). Most of Van Poyck's newly discovered evidence concerns events years after appellate counsel had finished his representation.

6. Juror Beatrice Bouie was properly excused for cause. She stated that she was firmly against the death penalty. [DE-18, pages 674-675]. Any attempts to rehabilitate her position were not sufficient to dispel the concern that Bouie's views would have prevented or substantially impaired the performance of her duties. [DE-18, pages 680-681]. The trial court was in the best position to access Bouie's demeanor and credibility. Maynard v. Dixon, 943 F. 2d 407 (4th Cir. 1991).

7. The felony murder aggravator is not unconstitutional. Johnson v. Dugger, 932 F. 2d 1360 (11th Cir.), cert. denied, 112 S.Ct. 427 (1991). The underlying felony conviction in a felony murder trial does not prevent that factor being considered in aggravation. Lowenfield v. Phelps, 484 U.S. 231 (1988).

8. The trial court did not improperly instruct the jury. The Court only reluctantly gave the defense instruction. [DE-20, page 2845]. It is highly likely that the Court Reporter heard the common word "illegal" instead of "lethal". The written instructions were given to each member of the jury [DE-21, pages 3020, 3055] and they were correct. It is highly likely that the jury would have referred to one of their copies of the written instructions, particularly when no argument was made by the lawyers that contemplating "illegal force would be sufficient to warrant a felony murder instruction". The prosecutor in his

closing argument referred to the written instructions when he addressed this issue during his closing argument [DE-20, pages 2913-2916]. The prosecutor, in his closing argument, read the word "lethal", not "illegal" [DE-20, page 2916], as did defense counsel [DE-21, pages 2999, 3011]. There are several other examples of the court reporter incorrectly transcribing words in DE-20: on page 2793, descent is written instead of dissent; on page 2770, Sintex is written instead of syntax; on page 2801, conversing is written instead of reversing; on page 2917, legal is written instead of lethal. Later, during the penalty phase charge conference, the court reporter again typed legal instead of lethal. [DE-21, page 3171, 3173]. At page 3173, the prosecutor quoted from Brumbley v. State, 453 So. 2d 381, 387 (Fla. 1984). Yet, the court reporter typed legal instead of lethal. Clearly, the prosecutor was saying lethal, not legal.

Moreover, this issue may not have been exhausted before the Florida Supreme Court. O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999). The Florida Supreme Court properly found that Van Poyck was the major participant in the felony [DE-20, page 2622] and had the culpable mental state to kill, irrespective of whether he was the triggerman. Van Poyck testified that Valdez marched Griffis to the rear of the van and during that time Valdez had the gun pointed to the back of Griffis' head. [DE-20, page 2587-2588]. The Petitioner's degree of participation was sufficient to support a finding that Van Poyck's involvement satisfied the Enmund[4] intent standard. Bush v. Singletary, 988 F. 2d 1082 (11th Cir. 1993).

9. The death sentence is independently supported, ignoring any evidence that Van Poyck was the triggerman. By checking the felony murder box the jury indicated a unanimous

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[4] Enmund v. Florida, 458 U.S. 782 (1982)

verdict for felony murder. That verdict is sufficient to sustain the sentence.

10. The great risk aggravator was properly considered in the trial court. The great risk aggravating factor is not impermissibly vague. Proffit v. Florida, 428 U.S. 242 (1976); Tuelaepa v. California, 512 U.S. 967 (1994). The trial court's findings support this aggravating factor:

> The Defendant in the commission of this crime for which he its sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurse's residence next door to the doctor's office where the murder occurred, in the direction and area Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. and Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg and Lisa Bancraft who were looking out the windows and door, along with another witness, Hoff who was standing in the alley watching the events.
>
> This Court believes that the chase that took place in Van Poyck and Mr. Valdez's attempt to escape from the scene where numerous police cars were fired at,

> approximately twenty shots total, on two of the busiest streets in Palm Beach County (Palm Beach Lakes Blvd., and Australian Blvd.) is a part of this aggravating factor of knowingly creating a great risk of death to many persons (see the convictions for counts 6 through 11).

Moreover, Van Poyck testified that he shot at the police cars during the chase [DE-20, pages 2609-2611].

11. No prejudice has been shown due to the shortness of time between the guilt and penalty phases. U.S. v. Schwensow, 151 F. 3d 650 (7th Cir. 1998); Mills v. Singletary, 161 F. 3d 1273, 1285-1286 (11th Cir. 1998). The Florida Supreme Court has correctly concluded that Van Poyck cannot show that more time for penalty phase preparation would have resulted in a life sentence. Van Poyck, 694 So. 2d 686, 695. Van Poyck had a first appearance hearing on June 25, 1987 [DE-17, page 1]. On February 19, 1988, Judge Michael Miller conducted a status conference. Van Poyck was satisfied with his trial counsel. [DE-17, pages 183, 434]. The court set the trial for August 15, 1988 [DE-17, page 22]. At a status conference on July 20, 1988, the court indicated that it may not allow much time between the guilt phase and the penalty phase [DE-17, page 233]. Penalty phase discovery had been provided as of July 20, 1988 [DE-17, pages 245, 248-249]. When two weeks before the August 15, 1988 trial date, the defense expert backed out of testifying, the trial court immediately replaced him with another expert [DE-17, pages 295-296]. On August 1, 1988 defense counsel stated that he needed 60-90 days to get ready. [DE-17, page 322]. Co-defendants were severed, and the trial commenced over two months after the original August 15th trial date.

On the first day of trial, October 31, 1988, there was a discussion about Van Poyck pleading guilty to first-degree murder. The trial court indicated that if there was a guilty plea, he had an intention to proceed immediately to the penalty phase. [DE- 17, page 426]. Defense counsel were aware during the guilt phase that the penalty phase would commence virtually immediately after the guilt phase. [DE-20, page 2814]. When it was announced that a verdict had been reached, defense counsel stated that the jury should be sequestered between the guilty verdict and the penalty phase. [DE-21, page 3111]. The court discussed bringing the jury back the next day, there was no objection, and the court sequestered the jury. [DE-21, page 3122]. In 1984, the Florida Supreme Court had mandated that deliberating juries in capital cases be sequestered. Livingston v. State, 458 So. 2d 235 (Fla. 1984). Soon thereafter, other appellate courts in Florida extended the sequestration rule during jury deliberations to non-capital cases. Busquet v. State, 498 So. 2d 1353 (Fla. 3d DCA 1986); Taylor v. State, 498 So. 2d 943 (Fla. 1986)[5]. At the time of the trial, it was not clear whether Florida judges had to sequester juries between the guilt and penalty phases. However, several weeks after this trial, the Florida Supreme Court refused to extend the requirement of sequestration to the period of time between the two phases of the trial. Banda v. State, 536 So. 2d 221 (Fla. 1988). After the jury had been sequestered overnight, when court reconvened the next morning, defense counsel moved for a continuance of the penalty phase. [DE-21, page 3129]. No abuse of discretion has been shown by the trial court's denying the request. It would have made no sense for the trial court to have sequestered the jury and then send them home for several

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[5] In 1992, the Florida Supreme Court amended Rule 3.370(b), Fla. Rules of Crim. Procedure to exclude non-capital cases from mandatory sequestration. Amendment to Rules of Criminal Procedure, 596 So. 2d 1036 (Fla. 1992).

days. When the Defendant waived any further sequestration, the trial court reset part of the defense penalty phase for two days. The Defendant agreed to this procedure. [DE-21, pages 3180-3183]. When the penalty phase reconvened two days later, there was no objection by the defense.

12. No violation of Brady v. Maryland occurred. Felder v. Johnson, 180 F. 3d 206 (5th Cir. 1999). There is no way that a medical examiner can or would speculate that the shots came from a particular side of a van. The perceived Brady material is pure speculation. Moreover, no prejudice has been shown. Felony murder still existed, and none of the four aggravating circumstances had anything to do with Van Poyck being the shooter.

13. The trial court properly considered non-statutory mitigating factors. The trial court need not have accepted those mitigating factors. Atkins v. Singletary, 965 F. 2d 952 (11th Cir. 1992). The court explained that Van Poyck was not under the influence of persons whom he had not seen in years. Further, the trial court was justified in finding that the death of Van Poyck's mother was not a mitigating factor.

14. Evidence of O'Brien's acquittal, O'Brien's affidavit, and impeachment testimony of Steven Turner do not constitute newly discovered evidence. Those evidentiary discoveries do not change Van Poyck's felony murder responsibility, and they would not have affected the outcome of the case. Fuller v. Roe, 182 F. 3d 699, 704 (9th Cir. 1999). The fact that another jury in 1989 found that a reasonable doubt existed as to O'Brien's knowledge of the attempted escape, does not constitute relevant evidence of the Defendant's involvement in it. Moreover, the Petitioner did not want to call O'Brien as a witness. [DE-29, pages 1096-1097].

15. Florida's death penalty statute is constitutional.

IV. CONCLUSION

None of the purported grounds for the instant habeas corpus petition can be sustained following a careful review of the voluminous record in this case. Petitioner William Van Poyck, an admitted thirteen (13) time convicted felon, received a fair trial under the laws of the State of Florida and the United States of America. Accordingly, it is ORDERED AND ADJUDGED as follows:

1. The Petition for a Writ of Habeas Corpus is hereby **DENIED.**

2. The Petition itself being denied on its merits, all outstanding motions not otherwise addressed herein are **DENIED AS MOOT;**

3. The Clerk shall close this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this _____day of September, 1999.

WILLIAM P. DIMITROULEAS
United States District Judge

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APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO.: 87-0736-CF A02
88-11116-CF A02

STATE OF FLORIDA

VS.

WILLIAM VAN POYCK,

Defendant.

ORDER

THIS MATTER is before the Court for Sentencing. The Court notes that the order will contain sentencing for each court and that the sentencing order will state the counts in the same order of the verdict form, not the order of the indictment.

COURT I: The jury having found the Defendant, WILLIAM VAN POYCK guilty of First-Degree Murder and having by a vote of eleven to one made a recommendation of death it is the judgment and sentence of the Court that WILLIAM VAN POYCK be sentenced to death for the murder of FRED GRIFFIS. Said sentence is to be carried out in accordance with the laws of the State of Florida.

The Court finds as aggravating circumstances the following:

1. The crime for which WILLIAM VAN POYCK is sentenced to death was committed while he was under a sentence of imprisonment in that he was on parole at the time of commission of this act.

2. The crime for which the Defendant is sentenced was committed for purpose of effecting an escape from custody and in this case to effect the escape of Mr. O'Brien.

3. The Defendant in the commission of this crime for which he is sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Mr. Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurses' residence next to the doctor's office where the murder occurred, in the direction and area Mr. Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. & Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg, and Lisa Bancraft, who were looking out the windows and door, along with another witness, Heff who was standing in the alley watching all the events.

This Court believes that the chase that took place in Mr. Van Poyck and Mr. Valdez's attempt to escape from the scene where numerous police cars were fired at, approximately twenty shots total, on two of the busiest streets in Palm Beach County, (Palm Beach Lakes Blvd. & Australian Blvd.) Is a part of this aggravating factor of knowingly creating a great risk of death to many persons, (see the convictions for counts 0 through 11).

4. The Defendant, WILLIAM VAN POYCK having previously been convicted of another capitol offense or felony involving the use of threat or violence to some person, in this case the prior conviction of the offense of robbery, which involved a shooting and chase.

Further this Court does not find that any mitigating factors exist or have been shown to exist. The defendant presented evidence which attempted to show that he was under the influence of another person to wit; his brother and or Mr. O'Brien. This Court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further the Defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The only other potential mitigating circumstance for which evidence was presented was that the Defendant, WILLIAM VAN POYCK's mother died when he was approximately eighteen (18) months of age. However it was shown that he was subsequently raised in a good family and by people that cared for him. Further the Court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdez to assist him and who checked the guns on th way to the location where the murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participate in this murder.

The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first-degree felony murder and or first-degree pre-mediated murder and in

reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

COUNT II: This Court for the sentence of armed robbery with a firearm sentences the Defendant, WILLIAM VAN POYCK to a term of LIFE in the State Department of Corrections with a three year mandatory minimum sentence to run consecutive with any sentence prior imposed.

COUNT VI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense or attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VIII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of the charge of attempted manslaughter, said sentence to run consecutive to any sentence prior imposed.

COUNT IX: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, this sentence to run consecutive to any prior imposed.

COUNT X: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XI: This Court sentences the Defendant, WILLIAM VAN POYCK to __15__ years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XII. This Court sentences the Defendant, WILLIAM VAN POYCK to __5__ years with a minimum mandatory sentence of 3 (three) years for the conviction of aggravated assault said sentence shall run consecutive to any prior imposed.

COUNT XIV. This court sentences Defendant, WILLIAM VAN POYCK to __15__ years for the conviction of aiding in the attempted escape said sentence to run consecutive to any prior imposed.

For the conviction contained in information 88-11116-CF A02 this Court on the charge of Attempted First-Degree Murder, this court sentences the Defendant to __LIFE__ In prison to run consecutive to any prior imposed, with a 3 year mandatory minimum. This mandatory minimum 3 year sentence shall run concurrent with the mandatory minimum sentence contained in count two.

DATE AND ORDERED this ____ day of _____, 198__, in West Palm Beach, Palm Beach County, Florida.

_____

MICHAEL D. MILLER
CIRCUIT COURT JUDGE

Supreme Court, U.S.
FILED
MAY 10 2001
CLERK

(2)

Case No. 00-1553

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

I PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL'S CLOSING ARGUMENT WAS APPROPRIATE TRIAL STRATEGY.

II. PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR "PER SE" INEFFECTIVENESS OF COUNSEL WHEN THE ALLEGATIONS REGARDING APPELLATE COUNSEL'S MENTAL INFIRMITIES AND DRUG USE FOUR YEARS AFTER PETITIONER'S APPEAL ARE IRRELEVANT .

III. PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY REGARDING THE EXISTENCE OF THE REQUISITE ENMUND/TISON FINDINGS AND THE APPLICABLE JURY INSTRUCTIONS.

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Case No. 00-1553

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The unreported single-judge order of the United States Court of Appeals, Eleventh Circuit, dates August 30, 2000, granting in part and denying in part Petitioner's motion to expand his certificate of appealability, appears in Petitioner's Appendix at A-2 through A-4. The November 9, 2000 order denying Petitioner's Motion for Reconsideration by a three judge panel appears in Petitioners Appendix at B-1 through B-2.

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1254 (1) and Hohn v. United States, 524 U.S. 236 (1998). However, this court does not have jurisdiction. The circumstances of Hohn v. U.S. illustrate the review on the merits that may enter a decision to deny a certificate of appealability, not a situation where a judge has denied relief without written opinion. In the instant case, there has been no written opinion regarding Petitioner's claims. Hence, Hohn does not apply.

Moreover, pursuant to Jones v. U.S., 224 F. 3d 1251 (11th Cir. 2000), under the plain language of Fed. R. App. P. 22 (b)(2), the applicant gets "two bites at the appeal certificate apple": one before the district judge, and if that one is unsuccessful, he gets a second one before a circuit judge. See also, Hunter v. United States, 101 F. 3d 1565 (11th Circ. 1996)(en banc). In this instance, the Petitioner has had three chances to obtain a certificate of appealability, once before the district court and twice in the circuit court. This court should deny the petition for lack of jurisdiction.

STANDARD OF REVIEW

To obtain a certificate of appealability (COA), a habeas Petitioner must make a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, (U.S. 2000); 28 U.S.C.A. § 2253(c).

STATEMENT OF THE CASE AND FACTS

On February 3, 1999, Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District court for the Southern District of Florida, raising 15 issues. Petitioner also filed a motion for an evidentiary hearing and a motion for leave to conduct discovery. On May 17, 1999, the Respondent filed a response to the petition for habeas corpus. On September 20, 1999, the District Court denied relief on all issues. Petitioner filed a notice of appeal and an application for a certificate of appealability for 16 issues. On November 15, 1999 the District Court certified two issues and denied certification on all others.

On February 11, 2000, Petitioner filed a Motion for Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit, seeking a COA on 11 issues. On August 30, 2000, a single judge granted a COA on four additional issues, but denied a COA for the other seven.

Petitioner filed a "Motion for Reconsideration by Three-Judge Panel of Single Judge's Denial in part of Certificate of Appealability", wherein, Petitioner sought a COA for three of the seven issues for which a certificate had been denied. On November 9, 2000, the Court of Appeals denied Petitioner's motion for reconsideration without written opinion.

1. Facts Pertaining to Question I

Respondent can not accept the facts as recited by Petitioner. The Petitioner has misread the record on appeal. Trial Counsel, Klein, argued that the death occurred during the escape and robbery but that it was not a consequence of, or in furtherance of either felony, rather it was an act committed independently by his co-defendant Valdez (ROA 2899-2900). Klein was emphasizing that Petitioner's only intent was to free

his friend, O'Brien, and that death was not contemplated nor a part of the escape plan.

2. Facts Pertaining to Question II

Appellate counsel's alleged drug abuse relates to a period of time well after Petitioner's appeal became final and encompasses a period of time in appellate counsel's life that occurred four years after the initial brief was filed. (Petitioner's App. D-21). The District Court denied the request since appellate counsel's alleged mental infirmities or drug abuse is irrelevant to the issue of ineffective assistance of counsel.

3. Facts Pertaining to Question III

Notably, the Petitioner has previously raised the Enmund/Tison claim in a petition for certiorari before this court in 1990 and this court denied the petition.

The record, which includes Van Poyck's own admissions that he planned O'Brien's escape, took responsibility for Griffis' death and admitted to possessing a gun, wholly undermines any claim that Van Poyck's non-triggerman status would have resulted in anything less than a capital conviction and sentence. In upholding his conviction and sentence of death on direct appeal, the Florida Supreme Court found that Petitioner approached the van, pointed a gun at Officer Turner and ordered him out of the van. At the same time, Petitioner's accomplice, Valdez, was on the other side of the van with the decedent, Griffis. Petitioner forced Turner under the van where Turner saw two sets of feet at the back of the van. Turner heard a series of shots and Griffis fell to the ground. Petitioner pulled Turner from under the van and attempted to kill him. Petitioner admitted that he armed

himself with three guns, one of them being the actual murder weapon. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990).

Petitioner has not called into question these findings.

With respect to Petitioner's attack on the propriety of the jury instructions, the District Court found that during closing argument, the prosecutor and defense counsel both referred to the written jury instructions and read the word lethal not illegal (Petr. App D-2).

REASONS FOR DENYING THE WRIT

QUESTION I

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL'S CLOSING ARGUMENT WAS APPROPRIATE TRIAL STRATEGY.

Petitioner claims that it was inexcusable for Klein to concede that Petitioner was guilty of the underlying felonies of robbery and attempted escape in this felony murder case.

The district court's findings are presumed correct unless they are clearly erroneous. Petitioner has failed to carry his burden that the findings are clearly erroneous, therefore, review of this issue is impermissible.

In it's order denying the habeas petition, the district judge specifically found that trial counsel did not concede guilt. The district judge determined that admissions in closing argument that are undeniable are not inappropriate. McClain v. Hill, 52 F. Supp 2d 1133 (C.D. Ca. 1999). Such admissions can lend credibility to other arguments. U.S. v. Short, 181 F. 3d 620, 624-625 (5th Cir. 1999); U.S. v. Wilks, 46 F. 3d 640 (7th Cir. 1995). The district judge reasoned that in this case, counsel's closing argument was appropriate trial strategy given the defendant's testimony and the independent act aspect of the felony murder instruction. U.S. v. Gomes, 177 F. 3d 76 (1st Cir. 1999).

Moreover, in McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984), the case centered on a tactical decision in a first degree murder case, where defense counsel argued that the

murder was not premeditated and that the jury should find at most that McNeal was guilty of manslaughter. The court reasoned that the arguments were tactical and strategic moreover there was overwhelming evidence against McNeal. Id. Furthermore, in that case, defense counsel consistently stressed McNeal's emotional state in an attempt to negate premeditation. Id.

The Petitioner relies on United States v. Cronic, 104 S. Ct. 2039 (1984), arguing that under that case, concessions of guilt constitute per se ineffectiveness, when such concessions result in a complete breakdown in the adversarial process. However, Cronic also says that the Sixth Amendment does not require that counsel do what is impossible or unethical, if there is no bona fide defense to a charge, counsel can not create one and may disserve the interests of his client by attempting a useless charade. Id.

A review of the transcript reveals that Klein did not concede guilt. Petitioner takes Klein's argument out of context. During closing argument, counsel stated that death did occur during the escape and robbery but that it was not a consequence of or in furtherance of either felony, but it was committed independently by Valdez. (ROA 2899-2900). Klein attempted to emphasize that Petitioner's only intent was to free O'Brien. Death was not contemplated, nor was it a part of the plan. (ROA 2900).

Given the overwhelming evidence against Petitioner, Klein's actions were not unreasonable. For example, Officer Turner testified unequivocally that Petitioner pointed a gun at him and took his [Turner's] gun. (ROA 1685-1691). Petitioner, knowledgeable about the felony murder rule, admitted on the stand that he put a gun to Turner's head, put him in fear, and took his gun. (ROA 2633-34). Turner was permanently deprived of his gun which was then used during the crime. (ROA 2633-34).

Evidence to establish the escape also came from Turner and Petitioner, himself. In fact, Petitioner testified that he planned the whole escape. He had contemplated freeing O'Brien since 1985. (ROA 2648, 2680, 2622, 2571-97). Further, Petitioner stated that he was going to testify at O'Brien's upcoming trial to explain that O'Brien was unaware of the escape attempt. (ROA 2662). Clearly, in light of the evidence against Petitioner, including his own testimony, Klein's strategy to emphasize that Petitioner did not kill Griffis was reasonable. See Kelly v. United States, 820 F.2d 1173 (11th Cir. 1987)(finding concession of guilt on importation charges in attempt to persuade jury of defendant's innocence on distribution charges reasonable where defendant arrested on boat loaded with marijuana).

Petitioner has failed to establish prejudice. He has offered no viable alternative to Klein's actions. To suggest that counsel should have argued that Turner's gun was not taken with intent to permanently deprive the officer of the weapon is not credible, given that the officer's gun was used during the rest of the criminal episode and ultimately found in the get-a-way car.

Hence, in light of the unassailable factual determination made by the district court, a certificate of appealability was properly denied because Petitioner has failed to demonstrate that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issue was adequate to deserve encouragement to proceed further.

QUESTION II

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR "PER SE" INEFFECTIVENESS OF COUNSEL WHEN THE ALLEGATIONS REGARDING APPELLATE COUNSEL'S MENTAL INFIRMITIES AND DRUG USE FOUR YEARS AFTER PETITIONER'S APPEAL ARE IRRELEVANT.

Petitioner urges this Court to adopt a "per se" ineffectiveness rule where, as in this case, appellate counsel suffered a mental breakdown from drug addiction. Also, Petitioner asserts that this claim is based upon recently discovered evidence that came to his attorney's attention after oral argument in his state habeas corpus action.

It is notable that Petitioner has been granted a certificate of appealability regarding his claim of ineffective assistance of appellate counsel under the guise of the following issue; "The Petitioner was denied the effective assistance of counsel on direct appeal because counsel failed to raise the issue of the trial court's errors in refusing to grant defense challenges for cause regarding jurors who would automatically vote for death, and who were convinced of Van Poyck's guilt, when two biased, pro-death jurors ultimately sat on the jury, contrary to the sixth, eighth, and fourteenth amendments." (Petr. App C-2, Habeas Petition Issue 3). Consequently, the Petitioner's entitlement to effective assistance of appellate counsel is already properly before the Eleventh Circuit. Hence, Petitioner's additional argument regarding counsel's drug addiction offers no insight into a determination of the effectiveness of Counsel's representation

Evidence of drug use is not relevant in and of itself, the Court must evaluate the actual conduct in light of the allegations. Bonin v. Calderon, 59 F. 3d 815 (9th Cir. 1995); *see also* Berry v. King, 765 F. 2d 451, 454 (5th Cir. 1985) (finding drug use by attorney not relevant in and of itself to an ineffective assistance of counsel claim; relevant inquiry is whether counsel's performance was deficient and caused prejudice).

In it's order denying the habeas petition, the District Court found that appellate counsel's alleged mental illness and drug abuse was irrelevant. That Court also found that the comparison to sleeping trial counsel was inappropriate. Both the trial court and the Florida Supreme Court found the representation to be effective, and those findings are entitled to a presumption of correctness. Williams v. Taylor, 163 F. 3d 860 (4th Cir. 1998). Most of Van Poyck's newly discovered evidence concerns events years after appellate counsel had finished his representation.

This claim is utterly baseless. Unlike claims of ineffective assistance of trial counsel that are properly raised in a motion for post conviction relief, similar claims involving appellate counsel do not center on the attorney's explanations regarding why certain avenues were explored and others were not. A determination regarding the constitutionality of appellate representation is a purely legal question conducted by an appellate court. Either the claim is legally established or it is not. A factual explanation concerning appellate counsel's motivation is totally irrelevant to the issue.

In this case, Petitioner's evidence relates to a period well after his appeal became final and encompasses a period of time in appellate counsel's life that occurred four years after the initial brief was filed. This claim is completely irrelevant and Petitioner has failed to carry his burden because there is absolutely no evidence in the record that counsel's drug use affected his representation.

Hence, a certificate of appealability was properly denied as reasonable jurists would not disagree on a claim that is legally insufficient as pled.

QUESTION III

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY REGARDING THE EXISTENCE OF THE REQUISITE ENMUND/TISON FINDINGS AND THE APPLICABLE JURY INSTRUCTIONS.

Although Petitioner argues that there was an error regarding the jury instructions, the primary focus pertains to whether there were sufficient findings pursuant to Enmund/Tison. Under Enmund v. Florida, 458 U.S. 82 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), the death penalty can be imposed in a felony murder case if the defendant was a major participant in the underlying crime and intended to kill or had shown reckless indifference to human life.

It is notable that Petitioner has been granted a certificate of appealability regarding his culpability under the guise of the following issue; "Whether the trial judge and trial jury considered an invalid aggravating factor, whether defendant was the triggerman at the sentencing phase (Issue 9 of Petitioner's Habeas Petition to the District Court)"(Petr. App. A-3). Consequently an additional issue with respect to the Petitioner's status as triggerman is unjustified.

Petitioner contends that both the trial court and the Florida Supreme Court failed to make the requisite findings. The Florida Supreme Court specifically found in Van Poyck v. State, 564 So.2d 1066, (Fla. 1990) (*quoting* Tison v. Arizona, 481 U.S. 137 (1987)), that;

in Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."

[a]lthough the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force

could be used, we find the death sentence is proportional.

Subsequently, after the Florida Supreme Court affirmed Petitioner's conviction, Petitioner petitioned this Court for review with respect to the Florida Supreme Court's findings, but this Court denied certiorari. Van Poyck v. Florida, 111 S.Ct. 1339 (1991).

Contrary to Petitioner's argument, both of the state courts' findings comply with the Enmund/Tison requirements.

The trial court's order found that Petitioner was a major participant in the felony committed, combined with reckless indifference to human life. The order pointed out that the state clearly presented competent and substantial evidence as to the crime of first degree felony murder and/or first degree premeditated murder. Also, during the discussion of mitigating factors the trial court's order explained how Petitioner planned the escape operation and checked the guns during the trip to see if they were loaded. (ROA, 4199). This satisfied the first portion of the test. In the course of describing the aggravating and potential mitigating circumstances, the court described the acts that showed reckless indifference to human life. It described Appellant's actions at the scene of the murder and the subsequent high speed chase through slippery crowded streets. All the while, Petitioner fired shots at the pursuing police cars. (ROA, 4199).

The same holds true for the Florida Supreme Court. The court determined that Petitioner approached the van, pointed a gun at one of the two corrections officers, Steven Turner, and ordered him out of the van. At the same time, Petitioner's accomplice was on the other side of the van with the decedent, Griffis. Petitioner forced Turner under the van. Soon after Turner saw two sets of feet near the back of the van where he heard a series of shots and Griffis fell to the ground. Petitioner then pulled Turner from under the van and eventually attempted

to kill him. Petitioner admitted that he planned the escape and recruited his accomplice. He also admits that he armed himself with three guns, one of them being the actual murder weapon. Van Poyck, 564 So.2d at 1067-1068.

There was an overwhelming amount of evidence in the instant case to establish that Petitioner's state of mind rose to the level of reckless indifference to human life to warrant the death penalty under Enmund/Tison. To reiterate, Petitioner testified that he planned O'Brien's escape and took responsibility for Griffis' death. Petitioner also admitted to possessing a gun. Officer Turner testified a gun was placed to his head and he heard a click when Petitioner pulled the trigger. Turner also testified that Petitioner told him he was going to die. In sum, Petitioner orchestrated an escape plan for O'Brien, participated with Valdez, his co-defendant, in that escape by attempting to kill one of the guards and discharging numerous rounds of ammunition to insure O'Brien's escape. In addition, Petitioner was shooting at the pursuing police cars in an effort to get away. In light of these factual findings, Petitioner has failed to establish that either the trial court or the Florida Supreme Court applied the incorrect standard when determining the appropriateness of his sentence. Thus, here we have two courts making the requisite finding and not just one.

The record, which includes Van Poyck's own admissions, wholly undermines any claim that Van Poyck's non triggerman status would have resulted in anything less than a capital conviction. Consequently, irrespective of the fact that he wasn't the triggerman, there was overwhelming evidence of his participation in the escape attempt and murder of Officer Griffis.

Hence, the degree of Petitioner's participation was sufficient to support a finding that Petitioner's involvement constituted the intent required by Enmund.

As a sub-issue, Petitioner challenges the propriety of the jury instructions regarding the appropriate requirements under

Enmund/Tison. Petitioner relies on a mis-statement in the transcript which reflects the following instruction;

> In order to recommend a sentence of death, the jury must find that the defendant killed or attempted to kill or intended or contemplated that a killing would take place, or that **illegal** force be employed. However if the jury finds that the defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the defendant did not actually kill or intend that killing take place (ROA 3582).

Although the transcript seems to support Petitioner's claim, the state refuses to concede that the trial court improperly instructed the jury. This is especially true in light of the fact that there was no objection by defense counsel and that the actual jury instructions themselves, which were physically present with the jurors and available for their review, contained the correct statement of the law. (ROA 4185).

Moreover, the District Court specifically found that the trial court did not improperly instruct the jury and found that it was highly likely that the court reporter heard the common word "illegal" instead of "lethal". (Pet'r App. D-21). The District Court further found that the correct written jury instructions were given to each member of the jury and that the prosecutor and defense counsel both referred to the written jury instructions and read the word **lethal** not illegal. (Pet'r App. D-22).

Petitioner is not entitled to a certificate of appealability because he has failed to satisfy his burden of demonstrating that the erroneous instruction was so prejudicial that it supports a collateral attack on the constitutional validity of the state court's judgment, where the burden is even greater than the showing required to establish plain error on direct appeal. Henderson v.

Kibbe, 97 S.Ct. 1730 (1977). The focus of any inquiry is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not simply "whether the instruction is undesirable, erroneous, or even 'universally condemned.'" Id. at 1739, citing Cupp v. Naughten, 94 S.Ct. 369 (1973).

The state submits that whether the trial court said "lethal" or "illegal" when giving the instructions did not infect the entire trial to the extent that Petitioner's conviction violated due process. Hence, the certificate of appealability was properly denied because reasonable jurists could not disagree that the state court's made the proper findings under Enmund/Tison and that the jury was properly instructed.

"Federal courts are not forums in which to relitigate state trials." Brecht v. Abrahamson, 113 S.Ct. 1710 (U.S.Wis. 1993). "The Court uniformly has been guided by the proposition that the writ of habeas corpus should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice". Id. It is clear that any perceived error in the instant case does not rise to this level.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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